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California Oral Will Contracts: The Decline of Testator Intent in the Shadow of Equitable Estoppel

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COMMENTS

CALIFORNIA ORAL WILL CONTRACTS: THE DECLINE OF TESTATOR INTENT IN THE SHADOW OF EQUITABLE ESTOPPEL

I. INTRODUCTION

Under California law, a person is free to enter into contractual agreements that either require her to make particular testamentary dispositions of property or that restrict or eliminate her ability to revoke an already existing will.[1] Although California law on this subject is historically doctrinal, the California legislature, in 1983,[2] enacted section 150 of the Probate Code.[3] Section 150 retained the spirit of the common law, including, most importantly, the requirement that all contracts to make or not to revoke a will be in writing and signed by the testator.[4]

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1. *See* CAL. PROB. CODE § 150 (West 1998); *see also* Morrison v. Land, 147 P. 259, 261 (Cal. 1915).

2. Although section 150 was adopted by the California legislature in 1983, it did not become effective until January 1, 1985. *See infra* note 3.

3. Probate Code section 150 provides:

(a) A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if made after December 31, 1984, can be established only by one of the following:
  (1) Provisions of a will stating material provisions of a contract.
  (2) An express reference in a will to the contract and extrinsic evidence proving the terms of the contract.
  (3) A writing signed by the decedent evidencing the contract.

(b) The execution of a joint will or mutual will does not create a presumption of a contract not to revoke the will or wills.

(c) A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if made on or before December 31, 1984, can be established only under the law applicable to the contract on December 31, 1984.

CAL. PROB. CODE § 150 (West 1998).

4. CAL. PROB. CODE § 150(a) (West 1998). Prior to the enactment of section 150, a contract to make or not to revoke a will was required to be in writing

Because will contracts have been subject to the statute of frauds even before the enactment of section 150,[5] the contract law doctrine of equitable estoppel is available "under certain unusual circumstances, in order to avoid unconscionable injury to one party and unjust enrichment to the other . . . ."[6] Moreover, in *Juran v. Epstein*,[7] the court specifically rejected the argument that section 150 stood for the proposition that equitable estoppel did not apply to contracts to make or not to revoke a will.[8] However, it is difficult to invoke estoppel in the will contract arena because there is a significant burden on "the plaintiff to prove the oral agreement and the elements of the estoppel by full, clear and convincing evidence."[9]

Because equitable estoppel operates as an exception to section 150's requirement that will contracts be in writing, courts faced with this issue are required to engage in a balancing of interests. The need to protect the plaintiff from unconscionable injury must be weighed against the interest in satisfying the statutory intent of Probate Code section 150. In striking this balance of interests, the reviewing court must, to the extent possible, adhere to the general principle in the law of wills that testator intent controls the interpretation of the instrument.[10]

This comment develops the argument that recent decisions in the California courts have been too willing to apply the estoppel doctrine, concluding that plaintiffs have suffered unconscionable injuries.[11] In this effort to protect plaintiffs, the unfortunate consequence has been to restrict the extent to which the will controls the disposition of the testator's property. First, the background section traces California ju-

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under subdivision 6 of California Civil Code section 1624. Notten v. Mensing, 45 P.2d 198, 199-200 (Cal. 1935).

5. *See Notten*, 45 P.2d at 199-200. *See also* cases cited *infra* note 6. "One court has characterized the succession statute as 'a mini-statute of frauds.'" Brody v. Bock, 897 P.2d 769, 774 (Colo. 1995) (quoting *In re* Estate of Moore, 669 P.2d 609, 612 (Ariz. Ct. App. 1983)).

6. Di Salvo v. Bank of California, 78 Cal. Rptr. 838, 840 (Ct. App. 1969); *see also* McCabe v. Healy, 70 P. 1008 (Cal. 1902) ("Courts of equity will, under special circumstances, enforce a contract to make a will or to make a certain testamentary disposition.").

7. 28 Cal. Rptr. 2d 588 (Ct. App. 1994).

8. Juran v. Epstein, 28 Cal. Rptr. 2d 588, 594-95 (Ct. App. 1994).

9. *Di Salvo*, 78 Cal. Rptr. at 841.

10. *See* CAL. PROB. CODE § 21102(a) (West 1998).

11. *See* discussion *infra* Part IV.

dicial history in this area of law.[12] Second, the analysis section explains the diminishing effects that recent court decisions have had on testator intent and examines the approaches taken by other jurisdictions in interpreting will contract statutes.[13] Finally, this comment proposes a solution suggesting that a sufficient remedy can be found simply by giving increased weight to the legislative purpose of section 150.[14]

II. BACKGROUND

A will is an instrument that provides instructions for the distribution of a person's real and personal property upon her death.[15] It is said that a will speaks only at the time of the testator's death,[16] meaning that it operates upon the circumstances as they exist at that time. Because the will becomes the voice of the testator on her death, it is of primary importance that the "intention of the [testator] *as expressed in the instrument* controls the legal effect of the dispositions made in the instrument."[17]

Throughout one's lifetime, however, it is common to make changes to one's will through the execution of amendments and codicils.[18] By its nature, a will is said to be ambulatory until the death of the testator, meaning that the testator remains free to alter or revoke her will at any time prior to death and without notice.[19] Therefore, a will has no legal effect until the death of the testator,[20] and as a result, persons named in a will do not acquire any rights as beneficiaries until the testator's death. However, because a will contract either requires the testator to make a particular testamentary disposition of her property or prevents her from

12. *See* discussion *infra* Part II.
13. *See* discussion *infra* Part IV.
14. *See* discussion *infra* Part V.
15. *See* BLACK'S LAW DICTIONARY 1598 (6th ed. 1990).
16. *Id.*
17. CAL. PROB. CODE § 21102(a) (West 1998) (emphasis added). *See also supra* text accompanying note 10.
18. A codicil is "[a] supplement or an addition to a will; it may explain, modify, add to, subtract from, qualify, alter, restrain or revoke provisions in [an] existing will." BLACK'S LAW DICTIONARY 258 (6th ed. 1990).
19. *See* PAUL G. HASKELL, PREFACE TO WILLS, TRUSTS AND ADMINISTRATION 57 (1987).
20. *Id.*

revoking or modifying her existing will,[21] the will loses its ambulatory nature at the time the contract is executed. Consequently, the people named in a valid contractual will acquire rights as beneficiaries *before* the testator dies.

A. *Types of Will Contracts: Contracts to Make Wills and Contracts Not to Revoke Wills*

There are two types of contracts that eliminate a will's ambulatory nature: (1) the contract to make a will and (2) the contract not to revoke an existing will.[22] The contract to make a will is most commonly utilized in situations where the testator promises to make a particular testamentary disposition in favor of a third person in consideration for services rendered by that person.[23] Contracts to make wills are most commonly breached when the testator, for whatever reason, fails to include the promised provision in her will.[24]

When a will contract is breached, the standard remedy in California is the judicial imposition of a constructive trust.[25] The constructive trust is a remedy in equity and seeks to restore to the plaintiff the property of the decedent's estate, which served as the consideration for the services rendered.[26]

Slightly different in purpose and effect is the contract not to revoke an existing will.[27] The parties to this type of will contract are usually husband and wife,[28] and the argument that a will contract existed is typically based on the spouses' execution of joint or mutual wills containing reciprocal provisions.[29] In this type of will contract, each spouse promises to

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21. *See* CAL. PROB. CODE § 150(a) (West 1998). *See also In re* Estate of Watson, 223 Cal. Rptr. 14, 16 (Ct. App. 1986) (citing Redke v. Silvertrust, 490 P.2d 805, 808 (Cal. 1971)).

22. *See* JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS AND ESTATES 307 (5th ed. 1995).

23. *See, e.g.*, Estate of Brenzikofer, 57 Cal. Rptr. 2d 401 (Ct. App. 1996) (involving an elderly widow who allegedly promised to leave her home to her neighbors in exchange for their promise to care for her and her cats).

24. *See, e.g.*, Estate of Housely, 65 Cal. Rptr. 2d 628 (Ct. App. 1997) (involving a testator and his son, the alleged contractual beneficiary, who got into a fight after the contract was made, resulting in the filing of that case when the testator subsequently wrote his son out of his will).

25. *See, e.g., Watson*, 223 Cal. Rptr. at 16.

26. *Id.*

27. *See* DUKEMINIER & JOHANSON *supra* note 22, at 305-07.

28. *Id.* at 306.

29. *See* Daniels v. Bridges, 267 P.2d 343, 345 (Cal. Ct. App. 1954).

leave his or her estate or a specified portion thereof if the wills so provide, to the surviving spouse, who then has the right to use as much of the income and principal as desired.[30] In consideration for this promise,[31] the surviving spouse agrees to dispose of the residue of the estate, or a portion thereof if the provisions of the wills so provide, in a manner agreed upon by the two spouses at the time the wills are executed.[32] Because a contract is formed in this "promise-for-promise" arrangement, any action by the surviving spouse that revokes or in any way alters the dispositive provisions of the original wills constitutes a breach of contract, giving rise to an estoppel claim and, therefore, the constructive trust remedy.[33]

B. *Enforceability of Will Contracts in General*

California common law has a long history of recognizing the right of a person to enter into a contract to make a particular testamentary disposition.[34] It was not until 1983,

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> A joint will is a single testamentary instrument constituting or containing the wills of two or more persons .... Mutual wills are the separate wills of two or more persons which are reciprocal in their provisions .... A joint and mutual will is one instrument executed jointly by two or more persons, the provisions of which are reciprocal.

Unlike the contract to make a will, which obligates the testator to make a specific disposition of property after the execution of the contract, a contract not to revoke a will is typically contained in the text of the joint will or mutual wills. It is important, however, that "[t]he execution of a joint will or mutual will does not create the presumption of a contract not to revoke the will or wills." CAL. PROB. CODE § 150(b) (West 1998).

30. *See* Byrne v. Laura, 60 Cal. Rptr. 2d 908 (Ct. App. 1997); *In re* Estate of Cates, 93 Cal. Rptr. 696 (Ct. App. 1971).

31. Although the contract itself is made at a time when it is uncertain who the surviving spouse will be, the promise to make specific distributions at the second death operates as consideration for a real promise. It is important to remember that the *promise* to leave the estate to the surviving spouse, not the actual receipt of the estate by the surviving spouse, is what gives rise to the need for consideration.

32. *See* DUKEMINIER & JOHANSON, *supra* note 22, at 306-07.

33. *See supra* note 25 and accompanying text. Litigation concerning the contract not to revoke or modify a will occurs most commonly when the surviving spouse, who is then the owner of the entire estate, revokes by executing a new will that provides for a different distribution of the estate on the survivor's death. *See, e.g.*, Thompson v. Boyd, 32 Cal. Rptr. 513 (Ct. App. 1963). Here, the beneficiaries of the allegedly contractual will, as third party beneficiaries, file the breach of contract claim seeking the constructive trust remedy. *See, e.g.*, Van Houten v. Whittaker, 337 P.2d 900 (Cal. Ct. App. 1959).

34. *See* Morrison v. Land, 147 P. 259 (Cal. 1915).

however, that the right to enter into such a contract was codified by the California legislature.[35] Probate Code section 150 specifies that a contract to make a will is enforceable only when: (1) the will contains the material provisions of the contract;[36] (2) the will makes an express reference to the contract;[37] or (3) there is "a writing signed by the decedent evidencing the contract."[38] Under section 150, a contract to make a will is enforceable only if it is in writing,[39] thus making will contracts subject to the statute of frauds.[40] Because section 150 "was derived from and is substantially identical to Uniform Probate Code section 2-514,"[41] an examination of the purpose behind section 2-514 is instructive in determining the legislative intent behind California Probate Code section 150.

A significant problem with will contracts relates to the fact that joint or mutual wills typically contain reciprocal provisions.[42] The identical nature of the dispositions seems to indicate that the parties to the will, most often husband and wife, entered into an agreement as to how their property will be distributed upon each of their deaths.[43] While some states presume that wills containing reciprocal provisions are contractual as a matter of law,[44] California shares the majority view that the "execution of a joint will or mutual will[s] does not create the presumption of a contract not to revoke the will or wills."[45] Rather, "a contract not to revoke is not enforceable unless it is proved by clear and convincing evidence."[46] Before the Uniform Probate Code handed down its recommendation as to how a will contract may properly be

35. *See* CAL. PROB. CODE § 150 (West 1998).
36. CAL. PROB. CODE § 150(a)(1) (West 1998).
37. CAL. PROB. CODE § 150(a)(2) (West 1998).
38. CAL. PROB. CODE § 150(a)(3) (West 1998).
39. *See generally* CAL. PROB. CODE § 150(a) (West 1998).
40. *See* CAL. CIV. CODE § 1624 (West 1998).
41. Juran v. Epstein, 28 Cal. Rptr. 2d 588, 594 n.5 (Ct. App. 1994).
42. *See supra* note 29.
43. *See* DUKEMINIER & JOHANSON, *supra* note 22, at 307.
44. *See infra* notes 58-63 and accompanying text.
45. CAL. PROB. CODE § 150(b) (West 1998). *See also* COLO. PROB. CODE § 15-11-514 (West 1998); 18-A ME. REV. ST. ANN. § 2-701 (West 1998); NEB. REV. ST. § 30-2351 (West 1998); N.J. STAT. ANN. 3A:2A-19 (West 1998); N.D. CENT. CODE § 30.1-09-13 West 1998).
46. DUKEMINIER & JOHANSON, *supra* note 22, at 307.

proved,[47] most jurisdictions, including California, were satisfied that the proper test for proving a will contract was the clear and convincing standard.[48] The contract itself did not have to be in writing,[49] and the court would consider extrinsic evidence in determining whether a contract existed.[50] Such evidence could include the language of the will itself and the factual circumstances surrounding the execution of the will in determining whether a will was made pursuant to a contract.[51]

Before California's adoption of Probate Code section 150, California courts never expressly required that will contracts be in writing.[52] However, the California Supreme Court, in *Notten v. Mensing*,[53] stated clearly that "since 1905, agreements [to leave property by will or not to revoke a will], under the provisions of the statute of frauds . . . must be in writing."[54] In *DeMattos v. McGovern*,[55] the plaintiff, alleging that a decedent breached an oral contract to leave plaintiff one-third of his estate in exchange for services rendered, sought to have a constructive trust imposed on that portion of the estate.[56] In refusing to impose the constructive trust, the court of appeal stated that under "section 1624 of the Civil Code and section 1973 of the Code of Civil Procedure, an agreement to make a will, or to leave property by deed or will is invalid unless in writing."[57]

Although California courts interpreted the clear and convincing standard to require will contracts to comply with the statute of frauds, other jurisdictions were more easily persuaded to impose a constructive trust for the benefit of the claimant. In *Fisher v. Capp*,[58] the Texas Civil Appeals Court found that a contract to make a will existed solely on the

47. *See* UNIF. PROB. CODE § 2-514 (1969).
48. *See* Rolls v. Allen, 269 P. 450 (Cal. 1928); *see also* DUKEMINIER & JOHANSON, *supra* note 22, at 307.
49. *See, e.g.*, Notten v. Mensing, 45 P.2d 198 (Cal. 1935).
50. *See, e.g.*, Lich v. Carlin, 7 Cal. Rptr. 555 (Ct. App. 1960).
51. *Id.* at 559.
52. *See, e.g.*, Rolls v. Allen, 269 P. 450 (Cal. 1928).
53. 45 P.2d 198 (Cal. 1935).
54. *Id.* at 200.
55. 77 P.2d 522 (Cal. Ct. App. 1938).
56. *Id.* at 523.
57. *Id.*
58. 597 S.W.2d 393 (Tex. Civ. App. 1980).

ground that the parties executed a joint and mutual will.[59] In *Fisher*, the court had no extrinsic evidence on which it could rely in determining whether a contract existed by the clear and convincing standard.[60] However, under Texas law, a joint will is contractual as a matter of law when the language of the will demonstrates "that the testators jointly planned the ultimate disposition of their combined estates in a manner evidencing an intent that the survivor would carry out the ultimate disposition without alteration."[61] Therefore, unlike California,[62] Texas courts presume the existence of a contract from the testator's execution of a joint and mutual will, even in the absence of any other evidence of a contract.[63]

The fact that many courts were inclined to presume a contract from a joint will made it quite easy for plaintiffs to successfully have constructive trusts imposed on decedents' estates.[64] Consequently, the door was opened to widespread litigation, which led to the drafting of Uniform Probate Code section 2-514.[65] Section 2-514 served as a suggestion to states to adopt statutes requiring will contracts to be in writing in order to reduce will contract litigation.[66] The last sentence of

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59. The Texas Supreme Court's definition of "mutual will" specifically indicated the presumption that mutual wills were contractual as a matter of law. "'Mutual wills' have been defined as wills executed pursuant to an *agreement* between two or more persons to dispose of their property in a particular manner, each in consideration of the other." Dickerson v. Yarborough, 212 S.W.2d 975, 978 (Tex. Civ. App. 1948).

60. Fisher v. Capp, 597 S.W.2d 393, 398 (Tex. Civ. App. 1980).

61. *Id.* at 399.

62. *See, e.g.*, Daniels v. Bridges, 267 P.2d 343 (Cal. Ct. App. 1954).

63. *Fisher*, 597 S.W.2d at 399; *see also* Helms v. Darmstatter, 215 N.E.2d 245, 248-49 (Ill. 1966) (reasoning that a joint will executed by a husband and wife gives rise to a presumption that the will is contractual when the will first provides that the surviving spouse is to receive the decedent's estate and then provides that, on the survivor's death, the estate is to be distributed equally between the families of each testator).

64. "The difficulty, however, is that the existence of a common dispositive scheme . . . in a jointly executed instrument strongly suggests an understanding or underlying agreement and thus invites a claim of contract . . . ." DUKEMINIER & JOHANSON, *supra* note 22, at 307.

65. *See* UNIF. PROB. CODE § 2-514 cmt. (1969) ("Oral contracts not to revoke wills have given rise to much litigation in a number of states; and in many states, if two persons execute a single document as their joint will, this gives rise to a presumption that the parties had contracted not to revoke the will.").

66. *See* UNIF. PROB. CODE § 2-514 (1969)

> A contract to make a will or devise, or not to revoke a will or devise, or to die intestate . . . may be established only by (i) provisions of the will

2-514 specifically repudiates the presumption that a will contract exists as a result of the creation of a joint or mutual will,[67] thereby making it clear that "the purpose of this section is to tighten the methods by which contracts concerning succession may be proved."[68] The California Legislature's enactment of section 150 is in exact accordance with 2-514[69] and demonstrates the legislature's intent to adopt the policy of the Uniform State Law Commission[70] by requiring all will contracts to be evidenced by a writing.[71]

C. *Enforceability of Oral Contracts to Make a Will*

This comment has already articulated the California view that the "mere fact that a joint will contains reciprocal, or similar or identical, [sic] provisions is not of itself sufficient evidence of a contract, nor is it enough to establish a legal obligation to forbear revocation in the absence of a valid contract."[72] Furthermore, since 1905, it has been the general rule in California that "oral agreements to leave property by will, or not to revoke a will already made, are unenforceable."[73] However, although Probate Code section 150 places will contracts within the statute of frauds,[74] "a party will be estopped from relying on the statute where fraud would result from refusal to enforce an oral contract."[75] Therefore, in the case of an oral will contract, a party can maintain an action for imposition of a constructive trust only if he can: (1) prove that a contract existed by offering clear and convincing evidence of the testator(s) intent to be bound by the terms of

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stating material provisions of the contract, (ii) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract, or (iii) a writing signed by the decedent evidencing the contract.

UNIF. PROB. CODE § 2-514 (1969).

67. *Id.* ("The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.").

68. UNIF. PROB. CODE § 2-514 cmt. (1969).

69. *See supra* note 41 and accompanying text.

70. *See supra* note 65 and accompanying text.

71. *See supra* notes 66, 68 and accompanying text.

72. Daniels v. Bridges, 267 P.2d 343, 346 (Cal. Ct. App. 1954).

73. Notten v. Mensing, 45 P.2d 198, 200 (Cal. 1935) (citing Luders v. Security Trust & Sav. Bank, 9 P.2d 271 (Cal. Ct. App. 1932); Cazaurang v. Carrey, 4 P.2d 259 (Cal. Ct. App. 1931).

74. CAL. CIV. CODE § 1624(6) (West 1998).

75. Estate of Housely, 65 Cal. Rptr. 2d 628, 632 (Ct. App. 1997) (citing Day v. Green, 380 P.2d 385 (Cal. 1963)).

the alleged agreement;[76] and (2) demonstrate that equitable estoppel is applicable[77] by showing that failure to enforce the contract would either result in unconscionable injury to a party who has seriously changed her position in reliance on the contract, or would unjustly enrich a party if the statute were permitted as a defense.[78]

Because the burden of proof is upon the plaintiff to show the oral agreement by clear and convincing evidence,[79] California courts have generally been hesitant to enforce oral will contracts. In *Shive v. Barrow*,[80] the plaintiffs alleged that the testator made a will pursuant to an oral agreement in which the plaintiffs would provide the testator with money and services for the purpose of making capital improvements to the testator's house.[81] In exchange, the testator would first leave the property to her surviving spouse, and on the death of the surviving spouse, the plaintiffs would become the owners.[82] After the testator died, however, the surviving spouse remarried and executed a new will[83] leaving the house to his new wife.[84] The plaintiffs sought to have a constructive trust imposed on the house, alleging that their performance of the contract between them and the decedent entitled them to ownership of the house.[85]

In rejecting the plaintiffs' claim that the will was contractual, the court focused on the nature of the remedy sought. The court said that since the plaintiffs sought par-

76. *See* Notten v. Mensing, 67 P.2d 734, 736 (Cal. Ct. App. 1937). (interpreting the California Civil Code to require will contracts to be certain and definite, founded upon an adequate consideration, and established by the clearest and most convincing evidence).

77. In *Juran v. Epstein*, 28 Cal. Rptr. 2d 588 (Ct. App. 1994), the California Court of Appeal concluded that the contract doctrine of equitable estoppel may apply to will contracts notwithstanding Probate Code section 150(a). *See also supra* note 6 and accompanying text.

78. *See* Redke v. Silvertrust, 490 P.2d 805, 809 (Cal. 1971).

79. *See* Rolls v. Allen, 269 P. 450, 452 (Cal. 1928).

80. 199 P.2d 693 (Cal. Ct. App. 1948).

81. Shive v. Barrow, 199 P.2d 693, 695 (Cal. Ct. App. 1948).

82. *Id.*

83. When a will is executed subsequent to a previously made will and the terms of the two wills are inconsistent with each other, the California Probate Code treats the prior will as having been revoked by the execution of the new will. *See* CAL. PROB. CODE § 6120(a) (West 1998).

84. *Shive*, 199 P.2d at 695.

85. *Id.* at 695-96.

ticular enforcement of the alleged contract, "this action . . . is one which is referable to the subject of the specific performance[86] for the principles of law applicable."[87] The contract at issue provided that the plaintiffs *would* agree "to 'advance *various sums* of money *as needed*'" by the testator.[88] In applying section 3390, the court concluded that the language of the alleged contract merely provided that the plaintiffs would agree to advance money, not that they actually entered into an agreement to advance the money.[89] Furthermore, the contract never specified how much money was needed or actually advanced.[90] Consequently, the court declined to impose a constructive trust on the property because the terms of the alleged agreement were not sufficiently definite or certain as to warrant specific performance under Civil Code section 3390.[91]

A subsequent California Supreme Court decision reinforced California's reluctance toward enforcing oral contracts to make or not to revoke wills. In *Halldin v. Usher*,[92] the testators executed a joint and mutual will which stated that on the death of the first spouse the survivor was to take the property in question;[93] and on the survivor's death the Magnolia Avenue property was to go to the testators' children.[94] However, after the first death, the survivor remarried and sold the Magnolia Avenue property[95] to a bona-fide purchaser.[96] The plaintiff sought to have a constructive trust

86. In California, section 3390 of the Civil Code sets forth appropriate situations where a party may be entitled to specific performance of a contract and provides, in pertinent part: "The following obligations *cannot* be specifically enforced: . . . 5. An agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable." CAL. CIV. CODE § 3390 (West 1998) (emphasis added).

87. Shive v. Barrow, 199 P.2d 693, 699 (Cal. Ct. App. 1948) (quoting Reyburn v. Young, 54 P.2d 87 (Cal. Ct. App. 1936)).

88. *Id.* (emphasis added).

89. *Id.*

90. *Id.*

91. *See supra* note 86.

92. 321 P.2d 746 (Cal. 1958).

93. *See* Halldin v. Usher, 321 P.2d 746, 747 (Cal. 1958). For purposes of this case discussion, the property in question will hereinafter be referred to as the "Magnolia Avenue" property.

94. *Id.*

95. *Id.*

96. *Id.* at 747-48.

imposed, alleging that the joint and mutual will was contractual and, therefore, irrevocable.[97]

The question of whether the will in this case was contractual or testamentary was a question of fact.[98] In rejecting the plaintiff's contention that the will was contractual,[99] the California Supreme Court concluded that "there was substantial and admissible parol evidence to the effect that the instrument was to be effective only at death and that it was intended to be a will [and not a contract]."[100] Therefore, under the *Halldin* decision, an oral will contract is not enforceable unless the plaintiff shows that the testator "clear[ly] and unambiguous[ly] intended to be bound by the provisions of the will."[101]

Through an examination of California judicial history concerning the enforceability of oral will contracts, it becomes clear that a plaintiff alleging breach of such a contract would have a difficult time proving that the contract existed.[102] This is not to say, however, that California does not recognize the oral contract to make a will altogether; in some cases, the will itself provides satisfactory evidence of a contract.[103] In *VanHouten v. Whitaker*,[104] the court determined that the particular language used in a joint will[105] was sufficient to evidence the fact that the testators intended to be bound by its provisions.[106] However, recent California decisions[107] appear to have made the clear and convincing standard significantly

97. *Id.* To rebut the plaintiff's contention, defendants offered parol evidence that the testators had no intention of being bound by the will at the time of its execution. Under this view, the will would speak only on the death of the testator. *Id.*

98. *See id.* (citing Michels v. Olmstead, 157 U.S. 198 (1895)).

99. Halldin v. Usher, 321 P.2d 746, 747 (Cal. 1958).

100. *Id.*

101. *Id.*

102. *See* discussion *supra* Part II.C.

103. *See, e.g.*, Mintz v. Rowitz, 91 Cal. Rptr. 435 (Ct. App. 1970).

104. 337 P.2d 900 (Cal. Ct. App. 1959).

105. Van Houten v. Whitaker, 337 P.2d 900, 902 (Cal. Ct. App. 1959). The will, in pertinent part, provided: "Both of us agree that upon the death of the last one of us the estate remaining shall be divided in half . . . ." *Id.*

106. *Id.* at 904.

107. *See, e.g.*, Estate of Housely, 65 Cal. Rptr. 2d 628 (Ct. App. 1997); Byrne v. Laura, 60 Cal. Rptr. 2d 908 (Ct. App. 1997); Estate of Brenzikofer, 57 Cal. Rptr. 2d 401 (Ct. App. 1996).

more plaintiff-friendly.[108] Before examining the cases that have most significantly contributed to this judicial evolution, some background on the interplay between will contracts and the doctrine of equitable estoppel is necessary.[109]

D. *Oral Will Contracts and Equitable Estoppel*

It is important to always keep in mind that proving the existence of an oral will contract is only half the battle;[110] to be entitled to the remedy of a constructive trust, the plaintiff must also demonstrate that an unconscionable injury would befall the plaintiff if the statute of frauds were invoked.[111]

Many cases involving the enforceability of an oral promise to make or not to revoke a will have a common factual situation: the surviving spouse, after having received a substantial benefit by inheriting the decedent's estate, revokes the joint or mutual will.[112] Even before Probate Code section 150 placed will contracts within the statute of frauds, "California courts have long applied equitable principles to enforce an oral promise not to revoke a mutual will where the survivor accepts benefits under the decedent's will."[113] If the beneficiaries under the newly executed will were allowed to invoke the statute of frauds, the "remedy [of a constructive trust] presumes that a constructive fraud has been practiced on the first decedent by the second decedent to the detriment of the original beneficiaries . . . ."[114] Moreover, the beneficiaries of the new will take benefits to which they would not be entitled if the statute of frauds were not available.[115] Assuming that an oral contract not to revoke or modify a will exists, courts will use estoppel to enforce the contract in situations where the will is revoked or materially modified by a party to the contract who has received a benefit under the terms of the contract.[116]

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108. *See* discussion *infra* Part II.E.
109. *See* discussion *infra* Part II.D.
110. *See* discussion *supra* Part II.C.
111. *See supra* text accompanying note 9.
112. This factual scenario is described as "classic." Mintz v. Rowitz, 91 Cal. Rptr. 435, 439 (Ct. App. 1970).
113. Juran v. Epstein, 28 Cal. Rptr. 2d 588, 593 (Ct. App. 1994).
114. Stahmer v. Schley, 157 Cal. Rptr. 756, 758 (Ct. App. 1979).
115. *Id.*
116. *Id.* The party referred to is typically the surviving spouse.

This presumption seems to indicate that once a plaintiff establishes the existence of an oral contract to make a will it is less difficult to convince a court that the defendant should be estopped from asserting the statute of frauds. However, consistent with California's general reluctance to enforce oral will contracts,[117] courts carefully consider whether equitable estoppel is appropriate in a given case, even after the contract is found to exist.[118]

In determining whether an unconscionable injury has occurred, courts place primary importance on examining whether the perpetrator of the fraud has received a substantial benefit.[119] In *Rolls v. Allen*,[120] the court denied imposition of a constructive trust because the plaintiffs had not proven the existence of a contract.[121] However, the California Supreme Court noted that even if a contract had been proven, a constructive trust would have been improper because the value of the estate was so minimal[122] that plaintiffs could not have shown that they had been prejudiced.[123] Moreover, the court emphasized the importance of the nominal value of the estate in its unconscionable injury determination when it said that "[a] different situation might be presented in a case where . . . a survivor received certain *substantial benefits* which he retained and enjoyed."[124]

For purposes of determining whether there had been an unconscionable injury, the California Court of Appeal, in

117. As discussed above, plaintiff's more difficult task is in bringing sufficient evidence that a will contract exists. *See* discussion *supra* Parts II.B-C.

118. *See* discussion *infra* Part II.D.

119. "The contracting party who survives becomes estopped from making any other or different disposition of the property . . . at least where he avails himself of the provisions of the decedent's will in his favor and accepts *substantial benefits thereunder*." VanHouten v. Whitaker, 337 P.2d 900, 903 (Cal. Ct. App. 1959) (quoting Brown v. Superior Court, 212 P.2d 878, 881 (Cal. 1949) (emphasis added)).

120. 269 P. 450 (Cal. 1928).

121. Rolls v. Allen, 269 P. 450, 452 (Cal. 1928).

122. *Id.* The dispute in this case was over the income from the estate. The estate itself was described by the court as "modest" and, under the facts, the value to the plaintiffs would have been diminished further because the surviving spouse would have been entitled to one-half of the income from her share of the community property, a family allowance, and a homestead. *Id.*

123. *Id.*

124. *Id.* (emphasis added).

Mintz v. Rowitz,[125] began to place less importance on the value of the estate sought to be held in constructive trust. In that case, a husband and wife had executed reciprocal wills, along with a written agreement not to revoke or alter the wills[126] unless both testators provided written consent.[127] In arguing that equitable estoppel should apply, the defendant claimed that the surviving spouse did not suffer an unconscionable injury because the surviving spouse never received any benefits from the decedent's estate.[128] However, the court made it clear that an unconscionable injury may be established either by a demonstration of prejudice *or* on a showing of unjust enrichment.[129] Since the surviving spouse did have control of the estate,[130] he could not make alternate distributions of the property; therefore the beneficiaries under the altered provisions of the will were deemed to have been unjustly enriched.[131]

E. *Recent California Litigation Concerning Will Contracts*[132]

As alluded to above,[133] California courts are less hesitant than they once were to impose constructive trusts on property sought to be claimed on grounds that there was an operative contract to make or not to revoke a will. In *Estate of Brenzikofer*,[134] plaintiffs claimed that they had an oral agreement with the decedent, Elnora Brenzikofer, whereby the plaintiffs would provide care for her and her cats in exchange for Elnora's promise to will them the house that

125. 91 Cal. Rptr. 435 (Ct. App. 1970).

126. Therefore, there was no doubt that a will contract did in fact exist. The only issue in this case was that of estoppel. Mintz v. Rowitz, 91 Cal. Rptr. 435, 438 (Ct. App. 1970).

127. *Id.* at 437.

128. *Id.* at 440. The court rejected this argument because many of the decedent's assets were not subject to probate administration. Even though the surviving spouse did not receive the assets in the estate pursuant to a formal administration procedure, he did possess and control the assets. In the court's view, therefore, he did receive a benefit. *Id.*

129. *Id.*

130. *See supra* note 128.

131. Mintz v. Rowitz, 91 Cal. Rptr. 435 (Ct. App. 1970).

132. *See* DAVID LANE, SELECTED RECENT DEVELOPMENTS IN ESTATE PLANNING & PROBATE 9-14 (1997).

133. *See* discussion *supra* Part II.C.

134. 57 Cal. Rptr. 2d 401 (Ct. App. 1996).

plaintiffs were renting from her.[135] After Elnora died, however, her will contained no such devise.[136] The plaintiffs, alleging an oral contract existed, brought this action seeking imposition of a constructive trust on the house.[137]

The trial court granted summary judgment for the Estate,[138] but the appellate court reversed and remanded "on the issue of whether a constructive trust was created by the oral representations of the decedent . . . ."[139] In holding that "the trial court abused its discretion in granting summary judgment,"[140] the court pointed to testimony offered in support of plaintiffs' claim that a contract existed.[141] Such testimony led to the court's conclusion that "an oral agreement could provide sufficient basis for 'an action for quasi-specific performance based on oral representations.'"[142]

The appellate court's decision in *Byrne v. Laura*,[143] represented a significant departure from the precedent established in *Shive v. Barrow*.[144] In *Shive*, the court held that plaintiffs were not entitled to specific performance of the alleged contract because its terms were not definite and certain.[145] The court in *Byrne*, however, ruled that a will contract with uncertain terms was enforceable because of a modern trend which favors holding promises enforceable despite uncer-

135. Estate of Brenzikofer, 57 Cal. Rptr. 2d 401, 403 (Ct. App. 1996). The parties stipulated that Elnora "made this sentiment known to the plaintiffs' relatives and neighbors." *Id.*

136. It is not clear from a reading of the facts whether Elnora simply forgot to include the devise in her will, whether that provision was intentionally omitted from her will, or whether the provision was first included in her will and later removed pursuant to a change of Elnora's intentions. *Id.*

137. *Id.* at 402.

138. *Id.*

139. *Id.* at 406.

140. *Id.* at 405.

141. A neighbor of both plaintiffs and decedent testified that "[decedent] stated to us that, in her will, the house [in which plaintiffs] were living was going to be for them." Estate of Brenzikofer, 57 Cal. Rptr. 2d 401, 405 (Ct. App. 1996). Also, the daughter-in-law of one of the plaintiffs testified that "[o]n many occasions, [decedent] stated to us that she would will the house the [plaintiffs] lived in to them." *Id.*

142. LANE, *supra* note 132, at 9 (quoting *Brenzikofer*, 57 Cal. Rptr. 2d at 405).

143. 60 Cal. Rptr. 2d 908 (Ct. App. 1997).

144. *See supra* notes 80-91 and accompanying text.

145. *See supra* text accompanying note 91.

tainty as to its terms.[146]

Byrne involved an alleged oral contract between Skip and Flo, who "cohabitated . . . as husband and wife."[147] When Skip died on June 29, 1993,[148] he left an estate worth approximately $1.2 million.[149] He had allegedly promised Flo that all of their property would be mutually owned, and upon the death of the first of them, the survivor would become the sole owner of all the remaining property.[150] Flo claimed that they had an oral contract providing that Skip would take care of her for the rest of her life in exchange for domestic services.[151] Evidencing the contract were Skip's assurances to her that "she did not have to worry because he would take care of her and she would 'have a roof over her head.'"[152] Flow also maintained that "a week before [his unexpected death],[153] [Skip] reiterated to her that he was going to put all his property into a living trust for her benefit."[154]

The estate argued that the promise was not enforceable because the contract did not comply with the writing requirement of Probate Code section 150.[155] However, the court held that section 150 was inapplicable because "[a]n agreement for support, even for a lifetime, is by its terms neither a 'contract to make a will' nor a contract to make a 'devise . . . .'"[156] Moreover, the court held that due to Flow's actions in reliance on Skip's promises, there was a material issue of fact as to whether equitable estoppel should be invoked in this case.[157]

California courts seemed to depart further from their reluctance to enforce oral will contracts with the decision in

146. Byrne v. Laura, 60 Cal. Rptr. 2d 908, 915 (Ct. App. 1997) (quoting Hennefer v. Butcher, 227 Cal. Rptr. 318, 322 (Ct. App. 1986)).

147. *Id.* at 912.

148. *Id.*

149. *Id.*

150. *Id.*

151. *See id.* at 911.

152. Byrne v. Laura, 60 Cal. Rptr. 2d 908, 912 (Ct. App. 1997). Skip also made repeated promises to Flo that "everything he had was [hers] and would someday belong to her." *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 915.

156. *Id.*

157. *Id.* at 917-18.

Estate of Housely.[158] In that case, the California Court of Appeal found a triable issue of fact as to whether a testator executed a contractual will in exchange for personal care services provided by his son.[159] The plaintiff, Brian Housely, lived with his father, John, for almost thirty years,[160] "only because [John] asked for and needed [Brian's] help, and there was no one else to take care of him."[161] John felt free to ask Brian for help with various matters and frequently said that Brian should help him because "he was going to leave everything to Brian in his will."[162] Although they shared living expenses for most of the time they lived together, once John retired, Brian assumed the costs of living for the both of them with the exception of property taxes, which John continued to pay.[163] Brian filed an action seeking imposition of a constructive trust when he discovered, after John had committed suicide,[164] that John had written Brian out of his will and removed him as a beneficiary of John's trust.[165]

The appellate court was satisfied that John's repeated demands for Brian's assistance in exchange for Brian's inclusion in John's will created a material fact as to whether an agreement was formed.[166] Furthermore, in reversing the trial court's order of summary judgment, the appellate court cited *Juran v. Epstein*[167] for the proposition that "section 150 does not preclude the application of equitable estoppel principles to enforce an oral agreement made post 1984 to make or not to revoke a will."[168] The court, citing Witkin, stated that "'considerations of policy indicate a restricted application of the statute of frauds if not its total abolition.'"[169] Brian's ten-

158. 65 Cal. Rptr. 2d 628 (Ct. App. 1997).

159. Estate of Housely, 65 Cal. Rptr. 2d 628, 630 (Ct. App. 1997).

160. *Id.* Brian lived with John continuously from 1959 to 1989 except for a three-year period during which Brian served in the military. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. Estate of Housely, 65 Cal. Rptr. 2d 628, 631 (Ct. App. 1997). Brian and John had a serious dispute on or about April 1, 1994 in which "John told Brian to stay away from him and threatened to shoot Brian." *Id.*

166. *Id.* at 632.

167. *See supra* note 7.

168. *Housely*, 65 Cal. Rptr. 2d at 633 (citing Juran v. Epstein, 28 Cal. Rptr. 2d 588, 594-95 (Ct. App. 1994)).

169. *Id.* (citing 1 WITKIN, CONTRACTS § 261, at 259 (9th ed. 1987)).

ure of service to his father, along with his acts of assuming most of John's living expenses was sufficient to create a triable issue of fact as to whether the estate should be estopped from asserting the statute of frauds.

III. IDENTIFICATION OF THE LEGAL PROBLEM

There is no question that recent California cases[170] concerning the enforceability of contracts to make or not to revoke a will have correctly determined that, if defendants were permitted to assert the statute of frauds defense, plaintiffs would have suffered an unconscionable injury. Testimony and other extrinsic evidence presented in these cases demonstrate clearly that the plaintiffs materially altered their positions in reliance on the testators' promises: (1) they provided many years of service for the testators;[171] (2) did not accept opportunities elsewhere by residing with or near the testator;[172] and (3) made significant financial contributions toward the testators' care.[173] Such evidence is undeniably indicative of unconscionable injury to plaintiffs if the promises on which they relied were not fulfilled.

The legal problem arises, however, not in the court's *method* of applying the doctrine of equitable estoppel, but in the decision of whether or not to apply the doctrine at all. Under California law, the fact that a plaintiff has suffered an unconscionable injury in reliance upon a testator's promise to devise property does not entitle the plaintiff to the imposition of a constructive trust unless the court first finds that a contract to devise the property existed.[174] As discussed in the previous section, for purposes of finding a contract, "the burden is on the plaintiff to show the oral contracts by clear and

170. For purposes of Parts III and IV, the phrase "recent California cases" refers to *Estate of Housely*, 65 Cal. Rptr. 2d 628 (Ct. App. 1997); *Byrne v. Laura*, 60 Cal. Rptr. 2d 908 (Ct. App. 1996); and *Estate of Brenzikofer*, 57 Cal. Rptr. 2d 401 (Ct. App. 1996). *See also supra* note 132.

171. *See, e.g., Brenzikofer*, 57 Cal. Rptr. 2d at 403; *Housely*, 65 Cal. Rptr. 2d at 630.

172. *See, e.g., Byrne*, 60 Cal. Rptr. 2d at 917; *Brenzikofer*, 57 Cal. Rptr. 2d at 405.

173. *See* discussion *supra* Part II.E.

174. An agreement to make or not to revoke a will, is a condition precedent to the maintenance of an action seeking imposition of the doctrine of equitable estoppel. Van Houten v. Whitaker, 337 P.2d 900, 903 (Cal. Ct. App. 1959).

convincing evidence."[175]

In recent California litigation on this subject, courts have misapplied this two-pronged test by imposing a constructive trust before finding that a contract existed. Thus, the remedy is granted before evaluating the propriety of the plaintiff's legal theory.[176] This practice of putting the cart before the horse relieves the plaintiff from the burden of producing evidence of the contract which satisfies the rigorous clear and convincing standard, clearly the more difficult part of a plaintiff's will contract case.[177]

IV. ANALYSIS

The factual scenarios arising in will contract litigation are of two main types. The "classic" situation,[178] involving a surviving spouse's breach of an alleged contract not to revoke an existing will, is representative of much of California's judicial history on this subject.[179] The other common situation arises when a party who has rendered services in reliance on a promise of a particular testamentary disposition discovers that, after the death of the testator, the will contained no such devise.[180] Because there is little variance in the facts surrounding will contract litigation, there is little room for courts to make factual distinctions between cases. Therefore, the question comes down to one of adherence to Probate Code section 150. Recent decisions by California courts, however, demonstrate an unwarranted departure from the statutory authority.

A. *Loose Application of Equitable Estoppel Undermines the Statutory Importance of Testator Intent*

In the interest of protecting persons who rely on oral promises to make wills, courts have lost sight of the fact that

175. *See supra* note 79 and accompanying text.

176. *See* discussion *infra* Part IV.A.

177. *See supra* note 170. In recent California cases, the plaintiffs all provided evidence of unconscionable injury.

178. *See supra* note 112 and accompanying text.

179. *See* Rolls v. Allen, 269 P. 450 (Cal. 1928); VanHouten v. Whitaker, 337 P.2d 900 (Cal. Ct. App. 1959); Shive v. Barrow, 199 P.2d 693 (Cal. Ct. App. 1948).

180. *See* Estate of Housely, 65 Cal. Rptr. 2d 628 (Ct. App. 1997)Estate of Brenzikofer, 57 Cal. Rptr. 2d 401 (Ct. App. 1996).

California law places primary importance on giving legal effect to the intent of the testator.[181] Because the doctrine of equitable estoppel has its origin in contract law, not in the law of wills,[182] there is an element present in will contracts that does not surface in most other types of contracts. Unlike many other agreements to which equitable estoppel was originally designed to apply,[183] litigation as to the existence of contractual wills does not often surface until the testator has died. Therefore, one of the parties to the contract is almost always unavailable to testify as to what was intended when the parties allegedly entered into a contract. Because the testator is unavailable to present his interpretation of the events giving rise to the litigation, the Probate Code emphatically protects his intent directly through rules of construction.[184] This is not to say that the doctrine of estoppel should not ever apply to will contract litigation,[185] but there is the special danger in dealing with will contracts that an unwarranted application of estoppel will prevent the instrument from carrying out the intent of the testator.[186] The situation in *Estate of Housely* illustrates clearly how the unwarranted application of equitable estoppel erodes the importance of testator intent.[187]

In *Housely*, it was clear that John intended at one point in his life to leave his entire estate to his son, Brian.[188] This being John's intent at that time, the Probate Code afforded him the opportunity to execute a controlling instrument providing for that disposition after his death.[189] However, it is also quite clear that, during his life, John changed his mind and no longer wanted to devise any property to Brian because

181. *See* CAL. PROB. CODE § 21102(a) (West 1998).

182. *See* RESTATEMENT (SECOND) OF CONTRACTS § 139 (1978).

183. It was not until 1994, eleven years after the enactment of section 150, that California specifically held that equitable estoppel did apply to will contracts. *See supra* note 8 and accompanying text.

184. *See* CAL. PROB. CODE §§ 21102(a), 21120 (West 1998).

185. *See supra* note 6.

186. *See supra* note 10 and accompanying text.

187. *See* discussion *supra* Part II.E.

188. There is no evidence in the case that Brian ever coerced John into naming him as the beneficiary of John's estate. Thus, it seems a proper assumption that naming Brian in the will was consistent with John's then existing testamentary intent.

189. *See* CAL. PROB. CODE §§ 6100, 21105 (West 1998).

of a serious quarrel they had.[190] Therefore, John amended his will to give legal effect to his intent to disinherit Brian.[191]

In holding that the constructive trust remedy may be appropriate, the *Housely* court set aside John's intention to exclude Brian from his will. More specifically, the court, with full knowledge of John's testamentary intentions at the time of his death, refused to give legal effect to those intentions, despite the fact that they were clear and definite. It is difficult to imagine circumstances that represent a more serious departure from the intent of the California Legislature. California Probate Code section 21102 (a) clearly states that "the intention of the transferor as *expressed in the instrument* controls the legal effect of the dispositions made in the instrument."[192] In this situation, the intent of the testator was abundantly clear, but even if John's final testamentary intent was ambiguous, the court would have been controlled by rules of construction requiring that legal effect be given to every expression in the instrument.[193]

Notwithstanding the principles of the law of wills cited above,[194] the court held that a trier of fact could find that there was sufficient evidence of a contract between John and his son that had the effect of requiring John's estate to pass to Brian.[195] In support of its holding, the court relied on John's statements that Brian should care for him because he was going to leave everything to Brian in his will.[196] This evidence, however, is of the same nature as that considered in *Daniels v. Bridges*[197] in which the court concluded that the language relied upon was "purely testamentary in character; [with] nothing to indicate . . . contractual intent."[198] Rather, it is more likely that John used the fact that Brian was to be beneficiary of his estate as leverage for obligating Brian mor-

190. Estate of Housely, 65 Cal. Rptr. 2d 628, 631 (Ct. App. 1997).
191. *Id.*
192. CAL. PROB. CODE § 21102(a) (West 1998) (emphasis added).
193. *See* CAL. PROB. CODE § 21120 (West 1998).
194. *See supra* text accompanying note 192.
195. *Housely,* 65 Cal. Rptr. 2d at 632.
196. *Id.* at 638.
197. In *Daniels*, the plaintiff presented language in the will itself in an attempt to prove the existence of a contract. The will provided that after the death of the two spouses, the estate was to pass to the plaintiff. Daniels v. Bridges, 267 P.2d 343, 344-45 (Cal. Ct. App. 1954).
198. *Id.* at 346.

ally to provide the care and services upon which John was dependent. The language "because John was going to leave Brian everything in his will,"[199] implies that, at the time the statement was made, Brian was already named in the will. Therefore, under a contract formation analysis, there was no contract because Brian never bargained for his inclusion in John's will.[200] If the *Housely* court had followed California precedent established in decisions such as *Rolls* and *Daniels*, it would have affirmed the trial court's order of summary judgment on the grounds that John's statements to Brian were not "most indisputable evidence of [an] agreement."[201] Moreover, even if it were possible to interpret John's statement as contractual, it still would fail under the clear and convincing test.[202] Without such clear and convincing evidence as required under California law, the instrument must control the disposition of the testator's estate.[203]

B. *Failure to Strictly Apply Section 150 Invites a Flood of Will Contract Litigation*

As the test for enforcing oral will contracts developed throughout California judicial history, the rigidity with which courts denied equitable relief to plaintiffs began to erode in the interest of protecting the person who relied on the promise.[204] In early cases, courts refused to impose constructive trusts absent clear and convincing evidence of the existence of an oral will contract, even when they were satisfied that the plaintiff had suffered an unconscionable injury.[205] However, as this issue became litigated more and more in the California courts, the practice of granting equitable relief to

199. *See supra* note 196 and accompanying text.

200. Because Brian was already included in the will at the time the statements was made, John's act of including Brian in his will is interpreted under contract law to be nothing more than a past consideration for the care services provided. Consequently, the alleged contract was never formed. *See* RESTATEMENT (SECOND) OF CONTRACTS § 71 (1978).

201. Rolls v. Allen, 269 P. 450, 452 (Cal. 1928).

202. *Id.*

203. *Id.*

204. *See id*; *cf.* Byrne v. Laura, 60 Cal. Rptr. 2d 908 (Ct. App. 1997).

205. *See, e.g.*, Daniels v. Bridges, 267 P.2d 343 (Cal. Ct. App. 1954) (holding that a constructive trust was not available on the grounds that there was nothing to indicate contractual intent, even though the surviving spouse accepted and enjoyed benefits from the decedent's estate).

plaintiffs that had materially relied on a promise began to win over the legal formality involved in proving the existence of a contract by a showing of clear and convincing evidence.[206] By relieving plaintiffs of the burden of proving the most difficult part of their case,[207] California courts opened wide the doors of will contract litigation, which Probate Code section 150 sought to keep only ajar.[208]

In holding that there was a material issue of fact in *Estate of Brenzikofer*,[209] as to whether a contract existed, the court relied on affidavits submitted by four non-party witnesses, each of whom had knowledge of the circumstances surrounding the litigation.[210] The affidavits conveyed the general message that Elnora Brenzikofer was very dependent on the plaintiffs and that it was her intention to leave her house to the plaintiffs in her will.[211]

A direct application of section 150 would have barred the plaintiffs' claim because there was no writing to evidence the contract. Moreover, under California precedent, this should not have been enforced as an oral contract because none of the language in any of the affidavits submitted indicated that there was any agreement between the decedent and the plaintiffs. Rather, the testimony in the affidavits was entirely testamentary, indicating only that the decedent, at one identifiable time in her life, intended to leave her house to the plaintiffs.[212]

Since there was nothing in the affidavits to suggest that

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206. *See* Di Salvo v. Bank of California, 78 Cal. Rptr. 838 (Ct. App. 1969) (focusing little attention on the question of whether there was, in fact, a legally formed contract).

207. *See supra* note 117.

208. *See* UNIF. PROB. CODE § 2-514 cmt. (1969). It is also important to remember that California's Probate Code section 150 is identical in substance to UNIF. PROB. CODE § 2-514 (1969). *See supra* note 41 and accompanying text.

209. *See supra* notes 134-41 and accompanying text.

210. Plaintiff presented four affidavits from decedent's neighbor and his wife, as well as affidavits from the son and daughter-in-law of one of the plaintiffs. Estate of Brenzikofer, 57 Cal. Rptr. 2d 401, 405 (Ct. App. 1996).

211. *Id.*

212. The affidavits of Natividad Diaz and his wife, Otilla, neighbors of the plaintiffs and decedent, state, in relevant part: "[Decedent] told us that she didn't know what she would do without [plaintiffs]. She stated that [plaintiffs] were like her hands and feet and that they did everything for her . . . . [Decedent] stated to us that in her will, the house [in which plaintiffs] were living was going to be for them." *Id.*

the decedent intended to be contractually bound by her statements, there was little support to the claim that the plaintiffs provided evidence of the most indisputable kind.[213] At the time Elnora made the statements contained in the affidavits, she probably did intend to will her house to the plaintiffs. But the fact that she never actually made the devise suggests that, at the time of her death, it was not her intention to devise her property to the plaintiffs; Elnora simply might have changed her mind.[214] The California Probate Code affords persons the right to change their wills at any time.[215] The courts cannot deny this right when the only evidence of a contract is statements made at one point in the testator's life where she expressed her desire to leave the plaintiffs her house. The court concluded that Elnora's act of expressing her then existing intent to devise her house to plaintiffs was sufficient to render her contractually bound to leave her house to the plaintiffs. If the California Legislature had wanted to make it this easy to form a will contract, it would not have deliberately placed will contracts within the ambit of the statute of frauds by enacting Probate Code section 150.[216]

Statutes governing the methods in which persons may enter into contracts limiting their statutory right to revoke their will,[217] or limiting their power to make testamentary dispositions of their property,[218] have been enacted for the purpose of reducing litigation in this area to only the most valid of claims; claims where the plaintiff can produce a writing evidencing the contract.[219] Notwithstanding the narrow exception to this rule, which allows courts to enforce oral will contracts that are proved by clear and convincing evidence, summary judgment in *Brenzikofer* and *Housely*[220]

213. Rolls v. Allen, 269 P. 450, 452 (Cal. 1928) (citing Edson v. Parsons, 50 N.E. 265 (N.Y. 1898)).

214. *See supra* note 136.

215. *See* CAL. PROB. CODE § 21102(a) (West 1998).

216. *See supra* note 3.

217. CAL. PROB. CODE § 6120 (West 1998).

218. CAL. PROB. CODE § 6100 (West 1998).

219. CAL. PROB. CODE § 150(a) (West 1998). *See also* UNIF. PROB. CODE § 2-514 cmt. (1969).

220. *See* discussion *supra* Part IV.A.

would have been affirmed because precedent[221] clearly indicates that the language relied upon by the *Brenzikofer* and *Housely* courts was not sufficient to evidence a contract. As a result, this type of reliance on an alleged promise to make a testamentary disposition was not of the type intended to be protected by California Probate Code section 150.[222] *Brenzikofer* and *Housely*, therefore, are abuses of this narrow exception to the general rule that contracts to make or not to revoke wills must be in writing to be enforceable. These decisions demonstrate the dangers in allowing the exception to swallow the rule.

C. *The Colorado Approach: Guidance for the California Courts*

California is among the many jurisdictions that models its statute governing will contracts after section 2-514 of the Uniform Probate Code.[223] Because of the widespread adoption of section 2-514,[224] courts in many jurisdictions have had occasion to interpret and apply this language. Consequently, there is a substantial body of law under which judicial interpretation of California's Probate Code section 150 may be evaluated. More specifically, in Colorado,[225] courts are less inclined to set aside the language in a testator's will in the interest of protecting the rights of third parties seeking constructive trust remedies.[226] As a result, Colorado strikes a

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221. *See* Rolls v. Allen, 269 P. 450 (Cal. 1928); Daniels v. Bridges, 267 P.2d 343 (Cal. Ct. App. 1954).

222. This policy is fully articulated in UNIF. PROB. CODE § 2-514 (1969).

223. *See, e.g.* COLO. PROB. CODE § 15-11-514 (West 1998); 18-A ME. REV. ST. ANN. § 2-701 (West 1998); NEB. REV. ST. § 30-2351 (West 1998); N.J. STAT. ANN. 3A:2A-19 (West 1998).

224. *See supra* note 223 and accompanying text.

225. Colorado Probate Code section 15-11-514 reads as follows:

> A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after July 1, 1995, *may be established only by*: (i) provisions of a will stating material provisions of the contract, (ii) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract, or (iii) a writing signed by the decedent evidencing the contract. The execution of a joint will or mutual wills does not create the presumption of a contract not to revoke the will or wills. (emphasis added).

COLO. PROB. CODE § 15-11-514 (West 1998). Compare this language with that of CAL. PROB. CODE § 150 (West 1998). *See supra* note 3.

226. *See* discussion *infra* Part IV.C.

more desirable balance between the competing interests of giving legal effect to testator intent and equitable estoppel. The case of *Rieck v. Rieck*[227] illustrates this balance.

Rieck involved mutual and reciprocal wills that allegedly required the surviving spouse to leave certain property to plaintiffs and defendant's son.[228] Following the death of the decedent, and fearful that the surviving spouse would change her will, plaintiffs sought to have the will declared irrevocable and nonmodifiable on grounds of the reciprocity and mutuality of the wills.[229]

In holding that the wills were fully revocable and modifiable,[230] the court found no evidence of an oral or written contract.[231] However, the will contract statute "is in the nature of a statute of frauds."[232] Thus, even if there was an oral contract not to revoke or modify the wills, such a contract still would not have been enforced by the *Rieck* Court because it was not in writing.[233] As compared to California's more liberal application of equitable estoppel, then, the Colorado approach weighs more heavily in favor of testator intent, placing emphasis on the fact that "[t]estators are charged with knowledge of the statute in existence at the time when their wills are made, and thus, any resulting inequities and not occasioned by the law, *but by their failure to adhere to it.*"[234]

As noted above, the Colorado approach is desirable because it gives adequate protection to the interests of the testator, while providing third parties the ability to successfully bring an estoppel claim and obtain a constructive trust remedy in appropriate situations. One predominant appropriate situation involves fraud. Under the Colorado approach, "the statute of frauds should not be permitted to be an instrument

227. 724 P.2d 674 (Colo. Ct. App. 1986).
228. Rieck v. Rieck, 724 P.2d 674, 675 (Colo. Ct. App. 1986).
229. *Id.*
230. *Id.*
231. *Id.* at 676.
232. *Id.* (citing *In re* Estate of Moore, 669 P.2d 609, 612 (Ariz. Ct. App. 1983). *See also supra* note 5.
233. Rieck v. Reick, 724 P.2d 674, 676 (Colo. Ct. App. 1986). The *Rieck* court makes special mention that "[e]ven if we assume the existence of an oral agreement . . . application of the equitable principles of part performance is unwarranted." *Id.*
234. *Id.* at 676-77 (emphasis added).

of fraud."[235] Thus, Colorado's section 15-11-514 will be set aside if its enforcement would otherwise result in a bar of a plaintiff's valid fraud claim.[236]

V. PROPOSAL

The above analysis has outlined the future dangers associated with excessively liberal application of the estoppel exception to Probate Code section 150's requirement that contracts to make or not to revoke a will be in writing.[237] In order to ensure that the exception does not swallow the rule, California courts should adopt the approach of the Colorado courts, thus returning to a more strict application of section 150. Construing will contract claims directly in light of the language and policy of section 150 will provide an assurance that courts will equitably balance the protection afforded to parties who detrimentally rely on a testator's promise, while giving full legal effect to the intent of the testator.

Because joint and reciprocal wills, on their face, seem to have been executed pursuant to an agreement,[238] equitable estoppel became a powerful tool in undermining the validity of the language in a will. In response, the drafters of the California Probate Code enacted section 150 with the intention of making it more difficult for plaintiffs to succeed on a will contract claim.[239] Legislative and judicial history evidences the proposition that section 150 was not intended to be trumped easily by the doctrine of equitable estoppel. An examination of characteristics surrounding section 150 lends support to this contention.

First, the statute is clear that contracts to make wills

235. Brody v. Bock, 897 P.2d 769, 774 (Colo. 1995) (citing Kiely v. St. Germain, 670 P.2d 764, 769-70 (Colo. 1983)).

236. *Id.* at 775. It is worthy of mention that other jurisdictions, including the Ninth Circuit, have held the position that a fraud claim is *not* justification for setting aside the statute of frauds. *See* Caplan v. Roberts, 506 F.2d 1039, 1041 (9th Cir. 1974). Given the Ninth Circuit's stringent interpretation of the statute of frauds as articulated in *Caplan*, the appeal of Colorado's approach is augmented by its ability to find that "middle ground" between protection of the testator's interest and that of the third parties seeking the constructive trust remedy.

237. *See* discussion *supra* Part IV.C.

238. *See generally* DUKEMINIER & JOHANSON, *supra* note 22, at 307.

239. *See* UNIF. PROB. CODE § 2-514 cmt. (1969).

"can be established *only* by one of the following."[240] Thereafter, section 150 lists three methods that are acceptable as a means of proving a contract to make a will, all of which require some type of writing evidencing the contract.[241] Second, judicial history, recognizing the need to apply equitable principles to will contracts in special situations, requires the plaintiff to first establish the existence of the contract "by the clearest and most convincing evidence."[242] In the case of oral will contracts, however, the fact that the plaintiff is required to meet a burden higher than that in most civil actions clearly indicates judicial intent to allow will contracts to be taken out of the statute of frauds only in circumstances where it is obvious that a contract existed.

By following the Colorado approach,[243] California courts would not run the risk of barring the use of equitable estoppel in appropriate situations. Certainly, the language of the will should be set aside where the testator never had any intention of making the devise in favor of the plaintiff. To allow such a fraud to be worked on a party who changed his position in material reliance on the testator's promise would unquestionably undermine the general principles of fairness, and the Colorado courts have been careful to permit equitable estoppel in such situations.[244] Nevertheless, absent intentional wrongdoing, estoppel is not available to set aside the operative language of a valid will.[245] Colorado courts, therefore, apply the laws and policies that arise in oral will contract litigation to produce a fair balancing between the interests of the testator and those of third parties seeking the constructive trust remedy. Therefore, California courts would be well-advised to re-examine their approach in light of Colorado law on this subject.

VI. CONCLUSION

It is important to protect the interests of persons who materially change their position in reliance on a contract.

240. CAL. PROB. CODE § 150(a) (West 1998) (emphasis added).
241. *See id.*
242. *See* Rolls v. Allen, 269 P. 450, 452 (Cal. 1928).
243. *See* discussion *supra* Part IV.C.
244. *See supra* note 235 and accompanying text.
245. *See* Rieck v. Rieck, 724 P.2d 674, 675 (Colo. Ct. App. 1986).

However, in most types of contracts, this protection is afforded because the opposing party can also explain the circumstances giving rise to the litigation in a way that suggests that neither party intended to enter into a contract. When dealing with will contracts, however, this situation is vastly different. In nearly all cases, the testator is deceased at the time the action commences and cannot testify on his own behalf as to the lack of contractual intent of the parties. Since the will does not speak until death, it is presumed that the testator's final intent is expressed in the language of the will, which controls the method by which the testator's property is distributed on his death.[246] Given this clear statutory importance of preserving testator intent, courts should be extremely careful in applying equitable estoppel in the context of will contracts. Recent California decisions have invoked this doctrine in inappropriate cases and the result has been to silence the deceased, who can only speak through their testamentary instruments. Therefore, a return to a more narrow construction of Probate Code section 150 is necessary to preserve the importance of testator intent.

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246. *See* CAL. PROB. CODE § 21102(a) (West 1998).